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FILED
Clerk, U.S. District Court
OCT 26 2004
Central District of California
By /s/ (initials) Deputy

ENTERED
Clerk, U.S. District Court
OCT 27 2004
Central District of California
By /s/ (initials) Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ITTELLA FOODS, INC.,

Plaintiff,

v.

ZURICH INSURANCE COMPANY, et al.,

Defendants.

CV 01-3620 LGB (PLAx)

ORDER DENYING DEFENDANT'S RULE 60 MOTION RE; BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

I. INTRODUCTION

Plaintiff Itella Foods, Inc. ("Ittella") sued Defendant Northern Insurance Company ("Northern") for breach of an insurance contract. A jury found that Northern breached the contract and had acted with "malice, oppression or fraud." The jury also awarded punitive damages to Ittella. Northern sought to nullify the jury verdict by a Rule 50 motion for judgment as a matter of law. This Court denied Northern's motion, finding instead that the jury verdict was supported by the record at trial.

Northern appealed the finding of bad faith and punitive damages to the Ninth Circuit. While the appeal was pending, Northern and Ittella signed a settlement agreement ("Agreement") concerning attorney's fees. The Agreement pegs Northern's liability for Ittella's attorneys' fees on the Ninth's Circuit's decision on the issue of bad faith.

The Ninth Circuit subsequently reversed the punitive damages award but declined to rule on the issue of bad faith. Northern asked the court to reconsider its ruling in light of the Agreement. The Ninth Circuit refused to reconsider its ruling.

Northern filed this Rule 60(b) motion to seek relief from the Court's rulings regarding bad faith. Ittella opposes.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Policy and Recall

The facts of the case are pertinent to the current attorneys' fees dispute, so a brief rendition of those facts is appropriate here.

Ittella is a food processing company which manufactures two separate products in one plant – seafood salad and salsa. (Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Adjudication ("Pltf.'s Statement in Support of Motion for SA") ¶¶ 1-2). On April 12, 2000, Defendant issued a business insurance policy number CNM 98520225 ("the Policy"), to Ittella. (Pltf.'s Statement in Support of Motion for SA ¶ 3; Defendant's Statement in Opposition to Motion for Summary Adjudication ("Def.'s Statement in Opposition") ¶ 3.) The Policy consists of a business suite of policies including Commercial Property coverage, Commercial General Liability ("CGL") coverage, and Commercial Automobile coverage. (Pltf.'s Statement in Support of Motion for SA ¶ 4; Def.'s Statement in Opposition to Pl's Motion ¶ 4.) The Policy covered the period of April 12, 2000 through April 2001. (Pltf.'s Statement in Support of Motion for SA ¶¶ 5-6; Def.'s Statement in Opposition ¶¶ 5-6.)

On October 2, 2000, the Canadian government took a routine sampling of Ittella's Seafood Salad that was stored in a Lucerne Foods (Safeway) warehouse in Canada. (Pltf.'s Statement in Support of Motion for SA ¶ 12; Def.'s Statement in Opposition") ¶ 12.) On October 16, 2000, Ittella was orally notified that the product had tested positive for Listeria Monocytogenes ("Listeria"). (Pltf.'s Statement in Support of Motion for SA ¶ 13; Def.'s Statement in Opposition ¶ 13.) Listeria is a pathogenic food contaminant which can cause damage to human beings. (Pltf.'s Statement in Support of Motion for SA ¶ 15; Def.'s Statement in Opposition to Pltf.'s Motion ¶ 15.)

On October 17, 2000, the Canadian government advised Ittella that it was issuing a Class II recall requiring all retailers to take the product off the shelf, but the recall did not require

Ittella to take any action. (Pltf.'s Statement in Support of Motion for SA ¶ 14; Def.'s Statement in Opposition ¶ 14.) Itella subsequently advised Lucerne to immediately destroy any Seafood Salad on the retail store shelves in Canada and to return any products stored in their warehouses. (Pltf.'s Statement in Support of Motion for SA ¶ 16; Def.'s Statement in Opposition") ¶ 16.) Ittella also immediately recalled and destroyed the Seafood Salad product with the same use date that had been delivered in the United States to Safeway divisions in Clackamas, Oregon, and Bellevue, Washington. (Pltf.'s Statement in Support of Motion for SA ¶ 17; Def.'s Statement in Opposition ¶ 17.)

After performing independent tests, Ittella discovered that the source of the Listeria was diced onions from a third party supplier. (Pltf.'s Statement in Support of Motion for SA ¶ 21; Def.'s Statement in Opposition ¶ 21.) Ittella decided to voluntarily recall all Seafood Salad from later batches which had tested positive for Listeria. (Pltf.'s Statement in Support of Motion for SA ¶ 23; Def.'s Statement in Opposition ¶ 23.) The contaminated product was returned to Ittella's plant, and Ittella destroyed the returned product along with the remaining undistributed product which was at the plant. (Pltf.'s Statement in Support of Motion for SA ¶¶ 24-25; Def.'s Statement in Opposition ¶¶ 24-25.) On the advice of the lab which performed the additional tests, Ittella suspended Seafood Salad production for approximately two weeks. (Pltf.'s Statement in Support of Motion for SA ¶ 31; Def.'s Statement in Opposition ¶ 31.)

Ittella submitted a claim to Northern seeking benefits under the Policy for all covered losses stemming from the tainted Seafood Salad. (Pltf.'s Statement in Support of Motion for SA ¶ 33; Def.'s Statement in Opposition ¶ 33.) On December 5, 2000, Northern paid Ittella a portion of the

claim pursuant to the Product Recall Expense coverage of the CGL portion of the Policy. (Pltf.'s Statement in Support of Motion for SA ¶ 35; Def.'s Statement in Opposition ¶ 35.)

On January 5, 2001, Myron Wasiunec ("Wasiunec"), an account specialist handling the matter on behalf of Northern, advised Ittella that Northern was willing to pay the rest of the $50,000 policy limit for product recall expense coverage and $3,087.69 for charges associated with the dumping and destruction of the product under Personal Property coverage. (Pltf.'s Statement in Support of Motion for SA ¶¶ 37-38; Def.'s Statement in Opposition ¶¶ 37-38.) Northern ultimately paid Ittella the policy limit of $50,000 for product recall expense coverage. (Pltf.'s Statement in Support of Motion for SA ¶ 37; Def.'s Statement in Opposition ¶ 37.)

However, Wasiunec said Northern was denying coverage for product and environmental testing, attorney's fees, and Itella's submission of $435,371.59 for business interruption loss. (Pltf.'s Statement in Support of Motion for SA ¶ 36; Defendant's Statement in Support of Defendant's Summary Judgment Motion ("Def.'s SJ Statement") ¶ 19; see Exhibit 7 to Dec. of Biren in Support of Pltf.'s Motion for SA; Exhibit 10 to Dec. of Patterson in Support of Def.'s SJ Motion.) On January 5, 2001, Ittella's insurance broker wrote to Wasiunec requesting that he reconsider Ittella's claim, arguing that: 1) the product value should not be included with the Product Recall expense but rather is covered by the Business Personal Property, for which Ittella had $4,475,000 coverage; 2) the suspension of operations at the plant qualified as a business interruption, entitling the insured to recover lost income; and 3) microbiology consultant and cleanup expenses should be covered as extra expenses under the Business Income and Extra Expense portion of the Business Personal Property Form. (Pltf.'s Statement in Support of Motion for SA ¶ 41;

Def.'s Statement in Opposition ¶ 41.)

On January 29, 2001, Wasiunec decided that even if the contaminated product was "covered property," which Northern denied, it was nonetheless subject to Policy exclusions including those for Ordinance or Law, Governmental Action, and Pollution. (Pltf.'s Statement in Support of Motion for SA ¶ 43; Def.'s Statement in Opposition ¶ 43; see Exhibit 9 to Dec. of Biren in Support of Pltf.'s Motion for SA; Exhibit 12 to Dec. of Patterson in Support of Def.'s SJ Motion.)

Ittella filed a Complaint against Northern in Los Angeles Superior Court on February 28, 2001. The Complaint alleged that Northern breached both the insurance contract and the covenant of good faith and fair dealing. (Complaint at 3-4.) Ittella sought damages, attorneys' fees, and other costs. (*Id.* at 5.) The case was removed to this Court on April 24, 2001.

B. Pre-Trial: The Court Denies Northern's Motion for Summary Judgment on Issue of Bad Faith

Prior to jury trial, on January 18, 2002, Northern moved for Summary Judgment on the issue of bad faith. Northern argued that there was no basis for Ittella's bad faith cause of action because Northern's denial of coverage was reasonable. (Def.'s SJ Motion at 18-19.) In considering Northern's motion, this Court held that two genuine issues of fact precluded the granting of summary judgment. First, the Court noted that under California law the adequacy of the insurer's investigation is one of the most critical factors in analyzing a bad faith claim. (Order Denying Defendant's Motion for Summary Judgment ("SJ Order") at 27.) The Court also noted that "the parties dispute whether Defendant denied

Ittella's claim without conducting any research." *Id.* at 27-28.

Second, the Court observed that both the Policy's Product Recall Expense Coverage and its Building and Personal Property Coverage contained pollution exclusions. *Id.* at 28. The Court further noted that Northern had agreed to pay the full amount of the Recall coverage while steadfastly refusing to pay anything under the Property coverage. *Id.* Given this state of events, the Court ruled that "genuine issues exist as to whether this shift constitutes an arbitrary cut-off of insurance benefits and thus, bad faith on the part of Defendant." *Id.*

C. The Jury Verdict and Northern's Rule 50 Motions

Jury trial was bifurcated into two stages. The first stage concerned whether Northern breached the implied duty of good faith and fair dealing and, additionally, whether this breach was done with malice, oppression or fraud. *See* Joint Special Verdict Form of May 23, 2002. The latter finding is required before a party can be held liable for punitive damages under California law.

The second stage of the trial concerned whether punitive damages would be awarded and, if so, the amount of such damages. *See* Joint Special Verdict Form II of July 3, 2002.

1. The Jury Finds that Northern Acted in Bad Faith; the Court Denies Northern's Rule 50(a) Motion as to Bad Faith and Punitive Damages Liability

Trial commenced on May 14, 2002. After the close of evidence in the first phase of trial, Northern filed a Motion for Judgment as a Matter of Law under F.R.Civ.P. 50(a). (Court's Civil Minute Order May 22, 2002.) The Court denied the motion as to good faith and fair dealing, but took the matter under submission as to punitive damages. *Id.*

The jury rendered a verdict for the plaintiff on May 23, 2002, and the Court entered Judgment on the jury verdict on July 8, 2002. The Court then reconsidered Northern's Rule 50 motion as to punitive damages. Since the Court's punitive damages analysis is pertinent to its bad faith analysis, the Court's reasons for denying Northern's Rule 50 motion will be recounted here.

As required under Rule 50, the Court examined the trial record in the light most favorable to the non-movant, Ittella. The Court noted several facts in the trial record which supported the jury's verdict. First, in October and November of 2000 the first two Northern adjusters notified Northern that Ittella was seeking coverage for both product loss and recall expenses. (July 25, 2002 Order Denying Defendant's Rule 50 Motion Regarding Punitive Damages ("July 25 Order") at 4.) Wasiunec also later concluded that the product was a separate loss that was not covered in the Policy's Recall coverage. *Id.* The Court noted that these determinations were in conflict with Northern's January 4, 2000 decision to tell Ittella that the product claims were subsumed under the Recall coverage and therefore subject o a $50,000 limit *Id.*

Second, Carol Stark, the Northern employee who expressly approved the January 4, 2000 decision, conceded on cross-examination that, under the actual language of the Governmental Exclusion stated, the exclusion applied only if there was a "seizure" of the product. *Id.* at 5; May 22, 2002 Transcripts at 63-64:22-3. Stark admitted the government did not "seize" the product. (May 22, 2002 Transcripts at 64:10-12.) Stark said she nonetheless believed that the exclusion applied because of her understanding of how prior recalls worked, but the Court reasoned that the jury could have disbelieved Stark's explanation. (Order re: Punitive Damages at 5.)

Third, the Court cited the lack of evidence in support of Northern's allegation that it worked diligently on the Ittella claim. The Court noted that there was "no evidence in the record" to support Northern's claim that it had requested coverage opinions. *Id.* at 6. There was also no evidence that Northern continued to work on Ittella's claim after January 4, 2000. *Id.*

Based on these facts the Court held that there was a sufficient basis for the jury to find that Northern: 1) consciously avoided paying out under the Property Coverage despite knowing it was Ittella's primary claim, 2) delayed addressing Ittella's product losses, 3) applied coverage exclusions that it knew did not apply, and 4) engaged in such actions even though it knew Ittella's losses were significant. (Order re: Punitive Damages at 5.) The Court concluded that "clear and convincing evidence supports the Jury's verdict that Northern is guilty of malice, oppression or fraud." Id. at 7. Accordingly, the Court denied Northern's motion.

After denying Northern's motion, the court held a one-day trial on the issue of punitive damages. After this second stage of trial, the jury found that punitive damages should be

assessed against Northern. The jury awarded Ittella $12,000,000 in punitive damages.

2. Northern Renews Its Rule 50(b) Motion for Judgment as a Matter of Law on the Issues of Bad Faith and Punitive Damages Liability; the Court Denies the Motion

After the jury reached its verdict, Northern filed a Rule 50(b) Motion and requested judgment as a matter of law on the issues of bad faith and punitive damages liability. The Court found no merit in Northern's argument, noting that:

> Northern rehashes much of the arguments it had brought fourth in its Rule 50(a) motion concerning punitive damages. Those arguments were rejected by this Court for the reasons stated in the July 25, 2002 order, and Northern does not provide anything here to sway this Court to change its mind. The Court, at bottom, finds that sufficient evidence supports both a finding of bad faith denial of benefits and malice, oppression and/or fraud to support the jury's verdicts in both Phase One and Phase Two of the instant action.

(August 2, 2004 Order Denying Northern's Motion for Judgment After Trial Pursuant to Rule 50(b).)

D. Northern Appeals the Judgment; the Court Subsequently Awards Attorneys' Fees to Ittella; Northern Appeals the Award

Northern appealed the Judgment to the Ninth Circuit on August 9, 2002.

Five days later, Ittella moved for the Court to set the amount of attorneys' fees based on the jury's finding of bad faith. The Court awarded attorneys' fees of $332,402.50 to Ittella on December 12, 2002. Northern appealed the award on December 17, 2002.

While both of Northern's appeals were still outstanding, the parties entered into a Conditional Settlement Agreement ("Agreement") with respect to attorneys' fees. The Agreement discharged the attorneys' fees appeal before the Ninth Circuit. The Agreement also specified that:

- 1. "In the event that the Ninth Circuit Court of Appeals upholds the judgment as to bad faith on appeal or after retrial, the parties agree that NORTHERN shall pay attorneys' fees in the amount of $315,782.38 as a compromise of appeal no. 02-56383; plus simple interest at the statutory rate from the date judgment on the attorneys' fees order was entered (December 17, 2002).

- 2. "In the event that the Ninth Circuit does not uphold the judgment as to bad faith on appeal or after retrial, the

parties agree that NORTHERN owes no attorneys' fees pursuant to the December 17 order.

- 3. "In either event, ITTELLA agrees that this Agreement supercedes the District Court's December 17, 2002 award and ITTELLA will not seek to enforce that award. ITTELLA releases all claims it may have to any attorneys' fees arising from case No. CV-01-03620-LGB (PLAx), subject to Paragraph 1, above, with the exception that if the case is remanded for further trial on the bad faith claim, ITTELLA reserves the right to claim attorneys' fees if it again prevails on that issue . . . ."

E. The Ninth Circuit's Memorandum Opinion Reverses Punitive Damages But Does Not Rule on Bad Faith or Attorneys' Fees

On March 29, 2004, the Ninth Circuit Court of Appeals issued an unpublished Memorandum on Northern's appeal of the Judgment in this case. The court noted that "the only damages in dispute were those sought by Ittella Foods for attorneys' fees, litigation costs, and punitive damages," but the court nonetheless limited its analysis to the issue of punitive damages only. (Memorandum at 2.) The court expressly avoided dealing with the jury's finding of bad faith, stating that "we need not reach a conclusion on whether Northern Insurance acted in bad faith because, under California law, a finding of bad faith is not sufficient to impose punitive

damages." *Id.* at 3. The Ninth Circuit panel's clearest reference to the issue of bad faith was in a footnote which stated that "If the issue [of bad faith] *were* properly before us for decision, we would be constrained to say that the evidence was not sufficient to support a tortious breach of the covenant of good faith and fair dealing." *Id.* at 6, fn. 21 (emphasis original).

The Court's analysis instead focused on the state's punitive damages standard, which requires "clear and convincing" evidence of "oppression, fraud, or malice." *Id.* at 4. Although the court did not specifically address any evidence offered at trial and considered by the jury or the district court, it nonetheless determined that there was insufficient evidence to support the punitive damages award. *Id.* at 6-7. The court affirmed the compensatory damage award, reversed the punitive damages award, and remanded the case to this Court. *Id.* at 7.

F. The Ninth Circuit Denies Northern's Petition for Rehearing

Northern filed a Petition for Rehearing ("Petition") on the issue of bad faith on June 4, 2004. Northern asked the Ninth Circuit to reconsider its decision that the issue of bad faith was not properly before it, pointing out that the court had noted that "attorneys' fees" were in dispute. (Petition at 3, fn. 1.) Northern also explained that the parties' settlement agreement was pegged to the issue of bad faith, and that the court's failure to make a finding on bad faith would leave the issue unresolved. *Id.* at 1.

The Ninth Circuit denied the Petition. the court noted that "Appellant [Northern] conceded that it was not seeking to recover any money paid on the policy for which bad faith

was claimed." (Ninth Circuit Order at 1.) The court also noted that "counsel advised us that a separate appeal regarding attorneys' fees (03-55111) was filed, mediated, and settled." *Id.* The court stated that it was denying the Petition because "the only relief at issue in this case is the punitive damages award." *Id.*

This Court held a hearing on August 19, 2004, to spread the Ninth Circuit's Mandate. After the Court reversed the $12 million punitive damages award, the parties informed the Court that the issue of attorneys' fees was still unresolved. The Court instructed Northern to file a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The Court then set an expedited briefing schedule on the motion.

Northern filed its Rule 60 Motion and accompanying Memorandum of Points and Authorities ("Motion") on August 27, 2004. Ittella filed an Opposition Memorandum of Points and Authorities ("Opposition") on September 3, 2004. Northern filed its Reply Memorandum of Points and Authorities ("Reply") on September 8, 2004.[1]

G. Northern's Motion

Northern filed the instant Motion under Federal Rule of Civil Procedure 60(b). Northern makes four arguments.

First, Northern argues that this Court has the discretion to revisit its prior rulings on the issue of bad faith. Those rulings are: a) the April 5, 2002 Order Denying Defendant's

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[1] Ittella subsequently filed a Surreply ad Supplemental Surreply. It admitted there was no procedural basis for the additional filings, and this Court agrees. The Court therefore declines to consider the additional Ittella filings as well as Northern's Objection to the Surreplies.

Motion for Summary Judgment on the issue of bad faith ("April 5 SJ Order"); and b) the May 23, 2002 denial of Northern's motion for judgment as a matter of law on the issue of bad faith ("May 23, Denial").[2]

Second, Northern argues that this Court should act in equity and reverse those prior rulings. Northern cites in its support both the Ninth Circuit's footnote 21 and two California cases which were decided after this Court ruled on the original motions in 2002.

Third, Northern argues that it does not owe Ittella any attorneys' fees under the terms of the Settlement Agreement.

Fourth and finally, Northern argues that the Settlement Agreement is too vague to be enforced. Northern urges the Court to reform the Agreement to provide that Northern will only owe attorneys' fees if the Ninth Circuit "agrees" that Northern acted in bad faith.

III. APPLICABLE LAW

A. Federal Rule of Civil Procedure 60(b)

Under Federal Rule of Civil Procedure 60(b), the Court may relieve a party from a final judgment, order or proceeding for one of six enumerated reasons, including "newly discovered evidence," F.R.Civ.P. 60(b)(2), or "any other reason justifying relief from the operation of the judgment," F.R. Civ.P. 60(b)(6). Northern has not specified which subsection of Rule 60(b) it depends on for this motion, but it appears that subsection (6) is the most applicable here.

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[2] The Court did not issue a written order when it denied Northern's motion on May 23.

A court may grant relief from a judgment under Rule 60(b)(6) "only where extraordinary circumstance prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir*, 984 F.2d 1047, 1049 (9th Cir. 1993). "Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interest." *Id.*; *see also Martella v. Marine Cooks and Stewards Union, Seafarers Intern. Union of North America, AFL-CIO*, 448 F.2d 729, 730 (9th Cir. 1971) ("In order to bring himself within the limited area of Rule 60(b)(6) a petitioner is required to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal.")

IV. ANALYSIS

A. The Court has the Discretion to Revisit its Prior Rulings

1. The Ninth Circuit's Mandate does not bar this Court from reconsidering the issue of bad faith

A district court has one task when enforcing the Mandate of the appellate court – it must "distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not." *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000). Although the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, the district court may still decide any issue "not expressly or impliedly disposed of on appeal." *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th

Cir. 1986). Northern acknowledges that footnote 21 is non-binding dicta. *See* Reply at 3:17-18 ("Northern does not contend that the conclusions [in footnote 21] are 'binding as legal precedent.'").

Ittella cites *Service Employees International Union Local 250 v. National Labor Relations Board*, 640 F.2d 1042 (9th Cir. 1981) for the proposition that the Ninth Circuit's Mandate precludes this Court from reconsidering the issue of bad faith. (Opposition at 3:14-19.) Ittella argues that when the Ninth Circuit failed to rule on bad faith, this Court's Judgment regarding bad faith became final. *Id.*

Service Employees involved a labor union's claim that an employer had committed unfair labor practices in violation of sections 8(a) (1), (3), (4) and (5) of the National Labor Relations Act. 640 F.2d at 1043. The National Labor Relations Board ruled that the employer violated section 8 (a) (1), (4) and (5), but it expressly declined to rule on the alleged 8 (a) (3) violation. *Id.* Both parties appealed the Board's decision – the employer challenged the rulings on sections 8 (a) (1), (4) and (5), and the union challenged the ruling on section 8 (a) (3). *Id.* at 1044. The Court of Appeals for the District of Columbia Circuit reversed the board's ruling on 8 (a) (1), (4) and (5). *Id.* The court declined to address the union's 8 (a) (3) appeal, however, stating it was "unnecessary to give further consideration" to the claim because the court's decision on the employer's petition rendered the union's petition moot. *Id.* The appeals court declined to remand any portion of the case to the Board. *Id.*

The union petitioned the appellate court for rehearing on the 8 (a) (3) issue, stating that its petition was "directed to the elements of the case totally ignored by the panel." *Id.* The appellate court denied the petition, and the union never filed

a petition for certiorari to the Supreme Court. *Id.* After the appellate court denied its petition, the union returned to the Board and asked it to reconsider its original ruling on the 8 (a) (3) issue. *Id.* the Board declined the motion, finding that the Court of Appeals, by not remanding the matter, had concluded the case and therefore stripped the Board of jurisdiction. *Id.* the union then appealed the issue to the Ninth Circuit.

The Ninth Circuit held that the D.C. Circuit's opinion was res judicata with respect to the 8 (a) (3) issue. *Id.* at 1045. The court reasoned that "[i]t was open to the Court of Appeals to remand the case to the Board for further proceedings on the section 8 (a) (3) claim if the court saw any merit to that contention. The failure to remand implies a determination that the stipulated facts presented no violation of section 8 (a) (3) and the court's written disposition supports this conclusion." *Id.*

Ittella argues that *Service Employees* requires a holding that the Ninth Circuit, by refusing to address the issue of bad faith, necessarily deprived this court of jurisdiction to hear Northern's appeal. (Opposition at 3:14-19, 7:8-10.) The Court disagrees. *Service Employees's* holding is strictly limited to cases in which a party asks the National Labor Relations Board to reconsider a ruling despite the absence of a remand order from the court of appeals. See, e.g., *N.L.R.B. v. Lundy Packing Co.*, 81 F.3d 25, 26 (4th Cir. 1996) ("Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court."); *George Banta Co., Inc., Banta Div. v. N.L.R.B.*, 686 F.2d 10, 16 (D.C. Cir. 1982) ("Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court."); *W.L. Miller Co. v. N.L.R.B.*, 988 F.2d 834, 837 (8th Cir. 1993) ("None of the parties applied to this

court for remand. . ."). The instant case does not involve the National Labor Relations Board, and in this case the Ninth Circuit *did* remand to the district court to strike punitive damages. The Court therefore finds that *Service Employees* is inapplicable to the facts of this case.

Since *Service Employees* is not applicable here, the Court is left with the general rule regarding the enforcement of mandates – namely, that the district court may still decide any issue "not expressly or impliedly disposed of on appeal." *Nguyen*, 792 F.2d at 1502. This Court has reviewed the Mandate and the subsequent Order denying Northern's petition for rehearing. The Ninth Circuit gave clear instructions that it was *not* ruling on the issue of bad faith. *See* Mandate at 3 ("Bad Faith . . . need not be decided . . .").

Ittella nonetheless asserts that the Ninth Circuit impliedly supported a finding of bad faith when it refused to hear the issue. (Opposition at 4:25-27.) This assertion is unsupported by the language of the Mandate and the Order. The Court therefore finds that the Mandate does not preclude this Court from reconsidering its judgments regarding bad faith.

B. Under Rule 60(b) the Court has Discretion to Reconsider Final Judgments and Orders When the Movant Has Shown Both Injury and "Extraordinary Circumstances"

Neither party disputes that the Court has the power, under Federal Rule of Civil Procedure 60(b), to revisit final orders or judgments. Under the *Alpine Land* standard, Northern is entitled to relief if it can show: 1) injury, and 2) "extraordinary circumstances." 984 F.2d at 1049.

Northern alleges that it will be injured here if it is forced to pay Ittella's attorneys' fees despite the Ninth Circuit's suggestion that Northern did not act in bad faith. (Motion at 3:22-4:1.) However, this injury would only occur if Northern is forced to pay Ittella under the terms of the Settlement Agreement – an agreement that Northern entered into willingly. (Motion at 2:21-25.) No case authority suggests that a party can be relieved from a judgment or order under Rule 60(b) for the purpose of escaping an injury of its own making.

1. Northern Must Show "Extraordinary Circumstances"

Even if the Court were to find that Northern's "injury" is sufficient to satisfy *Alpine Land*, Northern is ineligible for Rule 60(b)(6) relief unless it can show "extraordinary circumstances."

Northern cites three circumstances that have changed since this Court's prior orders. First, the Ninth Circuit's Mandate suggested, in footnote 21, that there was no grounds for a finding of bad faith. (Motion at 5:20-6:2.) Second, the subsequent decision in *Morris v. Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966 (2003). Third, the subsequent decision in *Buxbaum v. Aetna Life & Cas. Co.*, 103 Cal.App.4th 434 (2002).

a. The Ninth Circuit's dicta does not represent an "Extraordinary Circumstance"

Northern argues that footnote 21 is a "new fact that, particularly when coupled with new case authority, permits this Court to adjust its prior conclusions in the interest of

justice for the sake of consistency between the two tribunals." (Motion at 6:6-9.)[3]

Footnote 21 fails to qualify as an "extraordinary circumstance" for the purposes of Rule 60(b)(6) for three reasons. First, "extraordinary circumstances" are usually limited to those which explain and excuse a party's failure to file a timely appeal from an order or judgment. *Martella*, 448 F.2d at 730 ("In order to bring himself within the limited area of Rule 60(b)(6) a petitioner is required to establish the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal."),

Second, even if this Court were to extend the universe of "extraordinary circumstances" to include dicta in an appellate court's decision, footnote 21 would fall short. The footnote is not supported by a written analysis of the Ninth Circuit's reasoning for it. In the absence of at least some indication of the Ninth Circuit's rationale, including its discussion of how the facts of the case interact with California law, footnote 21 lacks persuasive force.

Third and finally, the Ninth Circuit itself recognized that bad faith requires only a "more probable than not" standard, while punitive damage awards require "clear and convincing evidence." (Mandate at 5.) The Ninth Circuit's reversal of

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[3] If Northern is attempting to argue that footnote 21 is a new "fact" that meets the requirements of "newly discovered evidence" under Rule 60(b)(2), the Court must reject that proposal out of hand. Northern cites no case authority to support this concept, probably because there is none. More importantly, if this Court were to adopt Northern's logic, every court decision could be considered "newly discovered evidence" for purposes of a Rule 60(b)(2) motion, something which would make nearly every case automatically eligible for Rule 60(b)(2).

punitive damages was directly traceable to this higher standard of proof. *Id.* at 6-7 ("We cannot say that the evidence was so one-sided as to meet the clear and convincing standard for the sort of conduct to which the California punitive damages standard is limited."). Since the Ninth Circuit's punitive damages analysis was both expressly and impliedly separate from any bad faith analysis, footnote 21 lacks persuasive force.

Because footnote 21 is dicta with no persuasive force, the Court finds that footnote 21 fails to support a Rule 60(b)(6) motion.

b. Supervening Cases Cited by Northern Do Not Rise to the Level of "Extraordinary Circumstances"

Northern also argues that two cases which were decided after this Court's bad faith orders – *Morris* and *Buxbaum* – provide the "catalyst" for this Court to revisit its prior rulings. Importantly, Northern never argues that either case overruled any of the case authority on which this Court relied in its earlier rulings. Northern says only that *Morris* "set[s] forth, with clarity never before articulated, a necessary component of the bad faith doctrine," (Motion at 6:10-17), and that *Buxbaum* is not "readily distinguishable" from this case, (Reply at 9:10-28).

Even if supervening cases could represent "extraordinary circumstances" – a proposition for which Northern cites no case authority – neither case addresses the reasons underlying this Court's original rulings. This Court's April 5 Order, which rejected Northern's summary judgment motion, relied heavily on *Shade Foods, Inc. v. Innovative Prods. Sales & Marketing, Inc.*, 78 Cal.App.4th 847, 879-80 (2000) (holding that one of the most critical factors to consider in analyzing a

bad faith claim is the adequacy of the insurer's investigation) and *Allstate Ins. Co. v. Madan*, 889 F.Supp. 374, 381 (C.D. Cal. 1995) (holding that an insurer is liable for bad faith if it disregards evidence supporting coverage). (April 5 Order at 27:16-28:23.) Neither *Morris* nor *Buxbaum* reversed *Shade Foods* or *Allstate*. The Court's May 22, 2002 denial of Northern's motion for judgment as a matter of law, which Northern also asks the Court to revisit, presumably relied on a similar rationale.[4]

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[4] The Court did not issue a written order when it denied Northern's oral Rule 50 motion on May 22, 2002, but the Court's rationale can be found in the Court's later rulings on the bad faith issue.

After the jury rendered its verdict on May 23, 2002, Northern moved for judgment as a matter of law on the issue of bad faith. In rejecting this motion, the Court noted that Northern's arguments on bad faith were identical to those that Northern presented with respect to punitive damages. (July 31, 2002 Order Denying Northern's Motion for Judgment After Trial Pursuant to Rule 50(b) at 8:1-3, 12-15.) The Court then noted that "those arguments were rejected by this Court for the reasons stated in the July 25, 2002 order and Northern does not provide anything here to sway this Court to change its mind." *Id.* at 8:15-21.

The Court's July 25, 2002 order arose out of Northern's motion for judgment as a matter of law on the issue of punitive damages liability. In that order the Court explained that there were ample facts to support the jury's verdict regarding punitive damages. This evidence is described in Section II(C)(1) of this Order. Based on these facts the Court held that there was a sufficient basis for the jury to find that Northern: 1) consciously avoided paying out under the Property Coverage despite knowing it was Ittella's primary claim, 2) delayed addressing Ittella's product losses, 3) applied coverage exclusions that it knew did not apply, and 4) engaged in such actions even though it knew Ittella's losses were significant. (Order re: Punitive Damages at 5.) The Court concluded that "clear and convincing evidence supports the jury's verdict that Northern is guilty of malice, oppression or fraud." *Id.* at 7. Accordingly, the Court denied Northern's motion.

At the hearing on this motion, Northern argues that dicta in the Ninth Circuit Memorandum opinion suggested that the Ninth Circuit believed that the genuine dispute doctrine applied to the facts in this case. Northern made a similar argument in its motion papers. (Motion at 9, fn. 4; Motion at 7, fn. 3.) According to Northern, if the Court were to find that Northern's actions were based on a "genuine dispute" about the applicability of certain policy terms, the Court would be required to find that Northern did not act in bad faith.

Northern's argument ignores substantial case law regarding an insurance company's duty to investigate claims in good faith. California courts have held that bad faith can be proven by the insurer's failure to adequately investigate the insured's claim. *See, e.g., Shade Foods, Inc. v. Innovative Prods., Sales & Marketing, Inc.*, 78 Cal.App.4th 847, 879-80 (2000) ("Among the most critical factors bearing on the insurer's good faith is the adequacy of its investigation of the claim."). In fact, the Ninth Circuit has held that the genuine dispute doctrine "does not eliminate bad faith claims based on an insurer's allegedly biased investigation." *Guebara v. Allstate Insurance Co.*, 237 F.3d 987, 996 (9th Cir. 2001). The Ninth Circuit has also held that a jury's finding that an insurer's investigation of a claim was biased may preclude a finding that the insurer was engaged in a genuine dispute. *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1010 (9th Cir. 2004); *see also Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003) ("Under *Guebara*, a genuine dispute does not exist where there is evidence that the insurer failed to conduct a thorough investigation.").

In short, California law's objective standard for determining the reasonableness of the insurer's conduct focuses on the entirety of the conduct itself, not just the presence or absence of legal support for an insurer's final

decision. *See Guebara*, 237 F.3d at 996 (citing five situations in which "biased investigation claims should go to a jury," including when "the insurer failed to conduct a thorough investigation"). When an insurer takes a series of actions that leads to the denial of coverage, some or all of those actions may be deemed unreasonable even though the denial of coverage has some justification under the law or under the terms of the policy. When this Court found that sufficient evidence existed to support the jury's finding of bad faith against Northern, the Court's analysis was based on the entirety of Northern's conduct, not just on its ultimate decision to deny payment.

Neither *Morris* nor *Buxbaum* overturns the significant case law which allows a finding of bad faith for an insurance company's failure to properly investigate a claim..[5] The Court

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[5] Northern also places significant reliance on *Chateau Chamberay Homeowners v. Associated International Insurance Co.*, 90 Cal.App.4th 335 (Cal.App.Ct. 2001) The Court finds that *Chateau Chamberay* is distinguishable.

In *Chateau Chamberay* the defendant insurance company conducted a thorough investigation into the insured's claims. *Id.* at 340-41. The appellate court upheld summary judgment in favor of the defendant, finding that "[t]here is no factually supported suggestion in this record that (1) [defendant] ever misrepresented the nature of its investigatory activity . . . (3) did not honestly select independent experts to make the appropriate loss evaluations . . . or, (5) failed to conclude a thorough investigation." *Id.* at 349.

In contrast, Ittella had significant factual support for its claim of inadequate investigation. As the Court pointed out in its April 5 Order denying summary judgment on the issue of bad faith, there was a genuine *factual* issue about whether Northern's changing coverage decisions were an arbitrary attempt to cut off Ittella's insurance benefits. (April 5 Order at 27:16-28:20.) The trial also produced evidence that Northern's

therefore finds that intervening case law, and the Court's prior application of existing law to the instant case, does not rise to the level of "extraordinary circumstances."

2. Conclusion: Northern has Provided No Reason for this Court to Reverse its Prior Rulings Regarding Bad Faith

Nothing cited by Northern supports a finding of "extraordinary circumstances" which would justify reversing this Court's previous rulings on the issue of bad faith. Footnote 21 of the Ninth Circuit's Mandate lacks persuasive force because it is devoid of factual analysis and relies on a different standard of proof than the Mandate's holding on punitive damages. Footnote 21 also does not constitute "new evidence" which would justify reconsideration of this Court's prior rulings. The *Morris* and *Buxbaum* cases, both cited by Northern here, do not overrule the cases on which this Court relied in denying Northern 's previous motions with regards to the issue of bad faith. As such, they are insufficient to support a Rule 60(b) motion.

This Court accordingly **DENIES** Northern's Rule 690(b) motion.

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investigation was biased and incomplete. The Court noted in its July 25 Order that Northern's coverage decisions were at odds with the opinions of both independent and company-employed adjusters, and that no evidence supported Northern's claims that it sought coverage opinions or continued to investigate Ittella's claims after January 4, 2002. (July 25 Order at 4:3-6:23.)

C. The Court Lacks Jurisdiction to Hear Northern's Contract Claims

In the alternative, Northern asks this Court to: 1) Find that an award of attorneys' fees would violate the Settlement Agreement, and/or 2) Reform the Settlement Agreement. (Motion at 9-11.)

In order for this Court to consider these requests, it must have jurisdiction over the Settlement Agreement. Although this Court ruled on the attorneys' fees issue originally, enforcement of a settlement agreement "is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 378 (1994); *see also Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995) ("a proceeding to enforce a settlement requires its own basis for jurisdiction, i.e., a district court does not retain 'inherent' or 'ancillary' subject matter jurisdiction to enforce a settlement simply because the dismissal of a federal action served as part of the consideration for the settlement agreement.").

This Court issued an Order Setting the Amount of Attorney's Fees on December 12, 2002. Northern immediately appealed the order to the Ninth Circuit.

On May 7, 2003, the parties signed the Settlement Agreement. The Settlement Agreement provided that Northern would dismiss its appeal to the Ninth Circuit. (Agreement ¶ 4.) The agreement also stated that Ittella would not seek to enforce this Court's December 2002 award of attorneys' fees. *Id.* ¶ 3. The terms of the Settlement Agreement were never incorporated into a court order.

The Court has reviewed the record of this case and has found no order, by either this Court or the Ninth Circuit, which grants this Court jurisdiction to enforce the parties' obligations to comply with the terms of the agreement. On these facts, the Court lacks jurisdiction to hear Northern's claims relating to the enforcement or terms of the Settlement Agreement. The Court therefore **DENIES** Northern's request for this Court to interpret or reform portions of the Settlement Agreement.

V. CONCLUSION

For the reasons stated above, the Court hereby:

- **DENIES** Defendant Northern Insurance Company's Rule 60(b) Motion Re: Breach of the Covenant of Good Faith and Fair Dealing.

- **DENIES** Defendant Northern Insurance Company's motion for this Court to interpret or reform portions of the May 2003 Settlement Agreement between Defendant Northern and Plaintiff Ittella Foods.

IT IS SO ORDERED.

DATE: October 26, 2004

LOURDES G. BAIRD
LOURDES G. BAIRD
United States District Judge